Supreme Court, U.S.
FILED

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No. _____

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 2000

LLOYD BRYANT, DESMOND BUTLER, DORIS BYRD, REGINALD CARPENTER, THEODORE DAVIS, MARY GRAYER, JUDGE HARDY, LARRY HARGROVE, JUANA HARPER, EDDIE HICKS, PRENTISS JACKSON, WILLIAM JAMES, VANCE KIMBER, BARRY MASTIN, MAURICE McCASTER, PAUL MIAL, REYES MORAN, CHERIFF MORGAN, YVONNE ROBINSON, HOLLY ROBINSON, CISCO ROWLAND, KEVIN RUSSELL, BRENDA SHEAD, EUGENE SHEPHERD, DIANE THOMPSON, CALVIN TYLER, EARL WASHINGTON, GERTRUDE WEST, AND WANDA WOODS,

Petitioners,

v.

CITY OF CHICAGO,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Does Title VII of the Civil Rights Act of 1964, as amended, require empirical validation when an employer seeks to show, under 42 U.S.C. §2000e-2(k)(1)(A), that an employment test which has a gross disparate impact is "job related for the position in question?"

2. May a test used for promotion to police lieutenant be shown to be a "reasonable measure of job performance" without empirical evidence that sergeants who score higher on the test will perform better as lieutenants than those who received lower scores?

3. Does Title VII of the Civil Rights Act of 1964, as amended, permit an employer to use a promotional test that has a significant disparate impact on minorities when the employer concedes that, as a group, minorities are equally qualified for promotion as non-minorities?

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PETITION FOR WRIT OF CERTIORARI

Petitioners[1] respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Seventh Circuit entered in this proceeding on January 14, 2000.

OPINIONS BELOW

The decision of the Court of Appeals (App. 1-18) is reported at 200 F.3d 1092. The opinions of the district court are reported at 917 F.Supp. 577 (N.D.Ill. 1996), (App. 21-38, (preliminary injunction), 8 F.Supp.2d 1095 (N.D.Ill. 1998), (decision on the merits, App. 39-74), and 19 F.Supp.2d 890 (N.D.Ill. 1998), (App. 75-80, ruling on remedy).

JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. §1254: The judgment of the court of appeals (App. 17) was entered on January 14, 2000. Rehearing was denied on February 16, 2000. (App. 18.)

STATUTORY PROVISION INVOLVED

This case involves 42 U.S.C. §2000e-2(k)(1)(A), which provides as follows:

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1. Petitioner are Lloyd Bryant, Desmond Butler, Doris Byrd, Reginald Carpenter, Theodore Davis, Mary Grayer, Judge Hardy, Larry Hargrove, Juana Harper, Eddie Hicks, Prentiss Jackson, William James, Vance Kimber, Barry Mastin, Maurice McCaster, Paul Mial, Reyes Moran, Cheriff Morgan, Yvonne Robinson, Holly Robinson, Cisco Rowland, Kevin Russell, Brenda Shead, Eugene Shepherd, Diane Thompson, Calvin Tyler, Earl Washington, Gertrude West, and Wanda Woods.

Sec. 2000e-2. Unlawful employment practices
***

(k) Burden of proof in disparate impact cases

(1)(A) An unlawful employment practice based on disparate impact is established under this subchapter only if —

(i) a complaining party demonstrates that a respondent uses a particular employment practice that causes a disparate impact on the basis of race, color, religion, sex, or national origin and the respondent fails to demonstrate that the challenged practice is job related for the position in question and consistent with business necessity; or

(ii) the complaining party makes the demonstration described in subparagraph (C) with respect to an alternative employment practice and the respondent refuses to adopt such alternative employment practice.

STATEMENT

In 1994, respondent City of Chicago administered a test for its police sergeants who sought a promotion to lieutenant. Respondent planned to promote those who attained the 108 highest scores.

Thirty-one percent of the 765 sergeants who completed the test were minorities.[2] Minorities made up less than six percent of those with the 108 highest scores.[3]

To minimize the disparate impact of the test, Chicago sought to supplement test score promotions with promotions

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2. Of the 765 sergeants who took the test, 184 were African-American and 55 were Hispanic,

3. Five African-American and 1 Hispanic sergeants were among the top 108.

based on past performance. Chicago selected thirteen police sergeants for merit promotions to complement 54 test score promotions; eight of the thirteen were minorities. The state courts, though, prohibited the merit promotions as contrary to state law. *McArdle v. Rodriguez*, 277 Ill.App.3d 365, 659 N.E.2d 1356 (1995). Chicago proceeded to make the test score promotions an advanced 51 white sergeants and 3 minority sergeants to lieutenant. As a result of these promotions, the minority representation in the lieutenant workforce dropped from about 23% to 19%.

Petitioners, a group of African-American and Hispanic Chicago police sergeants, filed suit in the district court to challenge the test score promotions. In a claim brought under Title VII of the Civil Rights Act of 1964, as amended, petitioners contended that the statistical evidence made out a *prima facie* case of disparate impact discrimination and asserted that Chicago would be unable to meet its burden of showing job relatedness under 42 U.S.C. §2000e-2(k)(1)(A)(i). Petitioners also asserted that merit promotions were an equally valid, less discriminatory alternative to test score promotions.

Shortly after Chicago announced its intent to make a second round of promotions from the test score list, petitioners requested the district court to issue a preliminary injunction to block further promotions. About 94% of these additional promotions were slated for white officers and the planned promotions would decrease the percentage of minority police lieutenants to slightly less than 14%.

After a hearing, the district court accepted Chicago's concession that the statistical evidence established a disparate impact. (App. 32.) The district court found that Chicago "does not have any empirical evidence to demonstrate that sergeants who score higher on the examination will perform better as lieutenants than those who receive lower scores," (App. 25), but refused to prohibit further promotions from the list, holding that petitioners could not establish

irreparable harm because, if petitioners prevailed on the merits, the court could order additional promotions. (App. 30.)

Trial on the merits focused on the job relatedness of the three sub-tests that made up the examination and on the opinion testimony on which Chicago had relied to use the composite test score for rank order selection. Petitioners challenged the opinion testimony as lacking empirical support. The district court acknowledged that Chicago had conceded that, as a group, minorities were equally qualified as non-minorities for promotion (App. 37), but rejected petitioner's legal arguments, concluding that each of the sub-tests was job-related and that use of the scores for rank order selection "is approved by the EEOC Guidelines and industry standards in connection with a content valid test." (App. 58.) The trial court concluded, however, that merit promotions were an equally valid, less discriminatory alternative (App. 59-62) and ordered the City to promote the 13 sergeants who had originally been selected for merit promotion. (App. 66.) The district court declined to order any additional merit promotions because "[t]o attempt now to identify sergeants who were deserving of merit promotion three years ago would be conjectural and overly subjective." (App. 68.)

On appeal, petitioners challenged the legal standard that the district court had applied in upholding use of test scores for rank order selection. Petitioners argued that when test scores have a disparate impact and are used for rank order selection, empirical evidence, rather than opinion testimony, is required to meet the standard of of *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 422 (1975), i.e., that test scores are "predictive of or significantly correlated with important elements of work behavior which comprise or are relevant to the job or jobs for which candidates are being evaluated." Petitioners also complained about the refusal of the district court to order additional promotions.

The Seventh Circuit rejected petitioner's arguments, holding that empirical data was not required because "[i]t

would be unrealistic to require more than a reasonable measure of job performance'' (App. 9-10.)

REASONS FOR GRANTING THE WRIT

This case raises an important and recurring question that arises whenever employment decisions are made on the basis of test scores that have a disparate impact on minorities.

Since the Court last visited this issue in *Albemarle Paper Co. v. Moody*, 422 U.S. 405 (1975), the Court of Appeals have reached conflicting answers to the question of whether Title VII requires empirical evidence of a relationship between test scores and job performance. This inter-circuit conflict involves the core protections enacted by Congress in 42 U.S.C. § 2000e-2(k)(1)(A)(i) as part of the Civil Rights Act of 1991 and should be resolved by this Court.

Employment tests have a well documented discriminatory impact. ''In the psychometric literature . . . it has become a virtual truism that the average performance of racial and ethnic groups . . . differs, sometimes by as much as a standard deviation.''[4] *See generally* Jencks, C., & Phillips, M., *The Black-White Test Score Gap* (1998).

The promotion test at issue in this case reduced the percentage of minority Chicago police lieutenants from 23% of the workforce to about 14%. (App. 26.) Although 31% of those who took the test were African-American and Hispanic, minorities made up about 6% of those promoted. (App. 39.) The poor showing of minorities on the test does not reflect differences in job performance: when Chicago selected 13

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4. Helms, *Why Is There No Study of Cultural Equivalence in Standardized Cognitive Ability Testing?* 47 Amer. Psychologist 1083 (1992).

sergeants for promotion on the basis of past performance, without regard to test scores, the group consisted of five white sergeants and eight minority sergeants — near perfect parity with minority representation in the sergeant workforce. (App. 65.)

Police administrators agree that when a police department fails to reflect the racial composition of the community it serves, it will be viewed as an "army of occupation" and will have difficulty securing citizen cooperation in reporting and solving crimes. This view was endorsed in this case by the Superintendent of the Chicago Police Department.

Petitioners argued below that when an employer seeks to use a discriminatory test, Title VII requires the employer to present empirical evidence of a relationship between test scores and job performance. Petitioners argued that without such empirical evidence, the employer cannot meet its burden of showing that scores on the test are "predictive of or significantly correlated with important elements of work behavior which comprise or are relevant to the job or jobs for which candidates are being evaluated." *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 422 (1975), quoting 29 CFR §1607.4 (c).

Chicago did not present any empirical evidence in this case and defended its test on the theory, accepted by the Seventh Circuit, that Title VII does not require empirical evidence relating test scores to actual job performance.

Aside from the Seventh Circuit, the courts of appeals that have considered this issue have rejected Chicago's legal theory. The rule outside of the Seventh Circuit is that an employer who seeks to make promotions by using test scores that have a disparate impact on minorities must present "evidence showing that those with a higher test score do better on the job than those with a lower test score." *Ensley Branch of NAACP v. Seibels*, 616 F.2d 812, 822 (5th Cir. 1980), opinion following remand, 31 F.3d 1548. This

showing must include "empirical evidence of an association between levels of performance on the multiple choice examination and on the job." *Firefighters Institute v. City of St. Louis,* 616 F.2d 350, 359 (8th Cir. 1980). When, as here, test scores are used for rank ordering, the employer must present evidence that a "one- or two-point differences in scores reflect differences in job performance." *Guardians Association v. Civil Service Commission,* 630 F.2d 79, 100-01 (2d Cir. 1980). With the exception of the Seventh Circuit, the uniform view is that a "discriminatory cutoff score is impermissible [under Title VII] unless shown to measure the minimum qualifications necessary for successful performance of the job in question." *Lanning v. Southeastern Pennsylvania Transportation Authority,* 181 F.3d 478, 489 (3d Cir. 1999).

The need for empirical evidence of a relationship between test scores and job performance is incorporated in the *Standards for Educational and Psychological Testing (1999)* that were recently adopted by the American Psychological Association, the American Educational Research Association, and the National Council on Measurement in Education. Under the *1999 APA Standards,* a passing score requires "evidence that scores are linked to different levels or likelihoods of success." Standard 14.7 states as follows:

> If tests are to be used to make job classification decisions (e.g., the pattern of predictor scores will be used to make differential job assignments), evidence that scores are linked to different levels or likelihoods of success among jobs of job groups is needed.

Chicago was unable to present empirical evidence of any relationship between test scores and future job performance. Chicago's expert conceded that there is no empirical evidence to show that scores on the "in-basket" or "oral"

components are related to job performance.[5] (Tr. 609, 535.) The expert cited a single, unpublished study to support his belief that scores on the written component of the test relate to job performance. (Tr. 513.)

The standard that the Seventh Circuit applied in determining the job-relatedness of the discriminatory test in this case is similar to that which this Court rejected in *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971). There, the district court had approved the use of a general intelligence test, *Griggs v. Duke Power Co.*, 292 F.Supp. 243, 250 (M.D.N.C. 1968), and a divided panel of the Fourth Circuit affirmed,

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5. The test consisted of three sub-tests: a 150 question multiple choice "job knowledge" test, a 60 question multiple choice "in-basket" test, and an "oral examination."

   The written test questions were based on Police Department General Orders, Police Department Special Orders, Illinois statutes, sections of the Chicago municipal code, the union contract, and a booklet that described Chicago's community policing philosophy. Petitioners argued below that the "job knowledge" test placed an unnecessary emphasis on an applicant's ability to memorize written materials.

   The "in-basket" was a sixty question multiple choice test that candidates were required to answer after reviewing written materials. Testimony at trial established that the use of multiple choice questions represented a significant change from the classic "in-basket" discussed in the psychometric literature. Chicago's expert admitted that this "objective in-basket" had never been experimentally validated. (Tr. 600.)

   The oral examination required the applicant to review written materials and make an oral presentation that was tape recorded for later scoring. The scoring system for this test had been devised by Chicago's expert and had neither been peer reviewed nor experimentally validated. (Tr. 534-35.)

holding that Title VII required only that the employer show "a genuine business purpose" and that the test had not "been designed or used to further the practice of racial discrimination." *Griggs v. Duke Power Co.*, 420 F.2d 1225, 1235 n. 8 (4th Cir. 1970). Here, the Seventh Circuit emphasized Chicago's good faith in establishing a "blue ribbon committee" to make recommendations about police promotions[6] (App. 5), in hiring a professional test developer (App. 5-6), and involving persons of all races in creating the test. (App. 12.) Neither the Fourth Circuit in *Griggs* nor the Seventh Circuit in this case required evidence that the test actually measured job performance.

This Court unanimously reversed the Fourth Circuit in *Griggs*, holding that in Title VII, Congress prohibited tests "unless they are demonstrably a reasonable measure of job performance." 401 U.S. at 436. The Court made plain that "If an employment practice which operates to exclude Negroes cannot be shown to be related to job performance, the practice is prohibited." Id. at 431. The decision of the Seventh Circuit in this case is flatly at odds with these principles.

The Seventh Circuit in this case excused Chicago from showing that test scores were related to job performance and held that Chicago had met its burden of justifying its use of the test to promote those with the 108 highest scores by showing that the test "is job related and representative" (App. 12-13) and that the test had been constructed "to

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6. The committee recommended that job performance, attendance, medical, and disciplinary records should be considered along with test scores in in promotion decisions. Chicago ignored this recommendation until it sought to supplement test score promotions with merit promotions.

ensure [its] reliability." (App. 13.)

Reliability "refers to the consistency of such measurements when the testing procedure is repeated on a population of individuals or groups." *1999 APA Standards* at 25. A test may be *reliable* because applicants will consistently receive the same score, but the score is not *valid* unless it is an accurate predictor of future performance. For example, height can be reliably measured — repeated measures of an applicant's height will produce the same value. But the reliability of this measure does not mean that height is a valid predictor of success on the job.

In the view of the Seventh Circuit, Chicago was only required to show that test scores were a "reasonable measure of job performance," (App. 11), and Chicago could meet this burden with evidence about the "preliminary efforts," (App. 12), that had been made to develop the test, i.e., by showing "the knowledge, expertise, and experience of those involved in the test development," (App. 12), and detailing "the preliminary use of peer review and pilot testing of each of its three parts." (Id.)

The job relatedness standard adopted by the Seventh Circuit provides for equal employment opportunity "in the sense of the fabled offer of milk to the stork and the fox." *Griggs v. Duke Power Co., supra,* 401 U.S. at 431. The appropriate rule that comports with the "business necessity" standard of 42 U.S.C. §2000e-2(K)(1)(A) is that "a discriminatory cutoff score is impermissible unless shown to measure the minimum qualifications necessary for successful performance of the job in question." *Lanning v. Southeastern Pennsylvania Transportation Authority, supra,* 181 F.3d at 489. Certiorari should be granted to resolve the conflict between the circuits on this important issue.

CONCLUSION

It is therefore respectfully submitted that the petition for writ of certiorari should be granted.

May, 2000

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